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No._____
IN THE SUPREME COURT OF THE UNITED STATES
October Term 1994

Robert Curley
Petitioner,

vs.

United States of America
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 7th CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Was the rejection of the following 2 jury instructions in a conspiracy case error: "A person who has no stake in a venture which has as its object the possession and distribution of drugs is not a conspirator of those who agreed to possess and distribute drugs. In order for the government to prove that a defendant was a conspirator with others who agreed to possess and distribute drugs, it is necessary for the government to prove beyond a reasonable doubt that such person's fortunes would rise or fall with the success or failure of that conspiracy." and,"A person is not a member of a conspiracy unless he has a stake in the venture. That is, unless he will profit by the achievement

of the conspiracy. A person who merely aids and abets conspirators is not a member of the conspiracy."

2. How should the conflict between the 2nd Circuit's holding in United States v. Falcone 109 F 2d 579, 581 (2d Cir. 1940) which held that an alleged conspirator "...must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders." 109 F 2d at 581 see also United States v. Zeuli 137 F 2d 845, 847 (2nd Cir. 1943) and United States v. Peoni 100 F 2d 401 (2nd Cir.1938) and the 7th Circuit's holding in this case United States v. Curley 55 F 3d 254 (7th

Cir. 1995) that a conspiracy defendant is not entitled to a "stake in the venture" instruction be resolved?

PARTIES

1. Robert Curley was defendant in the United States District Court for the Western District of Wisconsin, appellant in the United States Court of Appeals for the 7th Circuit and petitioner for Writ of Certiorari in this Court.

2. The United States of America was plaintiff in the United States District Court for the Western District of Wisconsin, appellee in the United States Court of Appeals for the 7th Circuit and respondent in this Court.

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DECISIONS BELOW

The judgment of the U.S. District Court is unpublished. The opinion of the United States Court of Appeals for the 7th Circuit affirming petitioner's conviction is reported at United States v. Curley 55 F 3d 254 (7th Cir. 1995) The judgment orders and the opinion are reproduced in the appendix to this petition.

JURISDICTION

On May 12, 1995 the United States Court of Appeals for the 7th Circuit filed a decision and entered a judgment affirming petitioner's conviction and sentence. No petition for rehearing was filed. Petitioner seeks to invoke this court's jurisdiction under 28 USC Sec. 1293 by filing this petition by mail on August 3, 1995 and within 90 days of the judgment of the Court of Appeals as required by rule 13.1 of the Court.

STATEMENT OF THE CASE

On August 4, 1993 a grand jury in the Western District of Wisconsin returned a 2 count indictment which charged: "Count 1. That between on or about November 1984 and on or about November 1988, the exact dates being unknown to the Grand Jury, in the Western District of Wisconsin and elsewhere, the defendants David Van Arsdale, Marcus Dorman and Robert W. Curley did knowingly and unlawfully conspire and agree with each other with Damien Connolly, John Connolly and with others, both known and unknown to the Grand Jury, to commit the following offenses against the United States. One, to unlawfully, knowingly and intentionally possess with intent to distribute marijuana, a Schedule I controlled substance, in violation of

Title 21, United States Code, Sections 841(a)(1) and 846. And, two, to unlawfully, knowingly and intentionally distribute marijuana as a Schedule I controlled substance in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

Count 2. That between on or about June 1, 1988 and August 12, 1988, in the Western District of Wisconsin and elsewhere, the defendants David Van Arsdale, Marcus Dorman and Robert W. Curley did knowingly and intentionally possess with intent to distribute marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code Section 841(a)(1) and Title 18, United States Code, Section 2." (tr. 3-141-142[transcript volume 3 pages 141 and 142])

During the trial the defendant asked that his proposed jury instructions 57 and 58 be given and the court refused the instructions. Defendant's instruction 57 reads:"A person who has no stake in a venture which has as its object the possession and distribution of drugs is not a conspirator of those who agreed to possess and distribute drugs. In order for the government to prove that a defendant was a conspirator with others who agreed to possess and distribute drugs, it is necessary for the government to prove beyond a reasonable doubt that such person's fortunes would rise or fall with the success or failure of that conspiracy." Defendant's instruction 58 reads:"A person is not a member of a conspiracy unless he has a stake in the venture. That is, unless

he will profit by the achievement of the conspiracy. A person who merely aids and abets conspirators is not a member of the conspiracy."

The jury returned a guilty verdict on the conspiracy count and a not guilty verdict on the possession with intent to distribute count.

The evidence at trial showed the following. Dawn Rexroat met Damien Connolly at the end of 1985 (tr.2-52) They became romantically involved. (tr.2-55) At first she thought that Damien was in the commercial real estate business (tr. 2-55). After she had known him for about 6 months she learned that he was involved in marijuana trafficking. (tr. 2-56) She moved in with him in the summer of 1986 (tr. 2-57). They lived with Tom Morgan on Mifflin Street in Madison. (tr.2-57-58)

Through Damien Dawn met his brother Desi, his parents, Tom Morgan and some of his friends from the St. Barts in the islands.(tr.2-58) In February Damien traveled to Thailand (tr.2-59). Damien told Dawn the purpose of the trip was for a vacation. (tr.2-59) He went with Fidelin Questell (tr.2-59) who was from St.Barts (tr.2-60). During that fist year Dawn did not go on trips with Damien except to Miami. (tr.2-60) About a year and a half after she met Damien she learned that he made his money from marijuana trafficking (tr.2-62). Through the course of her relationship with Damien she probably made six or seven trips. (tr.2-63) About a year after she learned about his marijuana activities she began to help him out with his trafficking activities (tr.2-64). She drove him places and took messages for

him (tr. 2-64).

Damien told Dawn he needed to go to St. Barts. (tr.2-67) He wanted to go there because he knew skippers who owned boats or who sailed boats.(tr.2-67) Dawn knew 2 or 3 of the skippers: Fidelin; a guy named Madness (Marc Dorman); and Diver.(tr. 2-67) Damien needed the skippers to sail boats to bring marijuana back to the United States from various places, mainly Jamaica.(tr.2-68) The boat would be loaded up and sailed back to the United States to a particular port in North Carolina, Beaufort, North Carolina.(tr.2-68)

Dawn recognized the defendant-appellant Bob Curley (tr.2-70). She met him briefly in 1987 when Curley stopped by her residence in Waunakee to see if Damien was there and identified himself by name. (tr 70-71) After that she saw

him on an infrequent basis (tr. 2-71). She knew the Curley lived in Dodgeville, WI (tr. 2-72). In the spring of 1988 she went with Damien to Curley's home to see his dogs (tr.2-73). She also saw Curley when she lived in Spring Green which is about 10 minutes from Dodgeville.(tr.2-74) She saw Curley infrequently. (tr.2-78)

In July 1988 Dawn provided assistance to Damien Connolly for his marijuana trafficking by carrying money to Jamaica. (tr.2-79) She went to Jamaica on July 7th and flew back July 11th (tr 2-79). He was in a desperate situation to get the money down to Jamaica and he needed it immediately and did not have anybody else to do it except Dawn.(tr 2-80) He was already in Jamaica. (tr.2-80)

Damien told Dawn that his reason he was traveling to Jamaica in early July was to make sure that the boat which he had obtained had arrived and to get the boat ready for sailing marijuana back to the United States.(tr.2-81) Before he went Damien said he had two possibilities of getting marijuana. (tr. 2-81) It was either Des [Desmond Cassidy (tr.2-122)] or Bob [Bob Curley (tr.2-82)] and Madness was going to sail the boat.(tr 2-81)

Dawn did not have any contact with Bob Curley in Madison before she traveled to Jamaica. (tr.2-82)

Dawn remembers the circumstances under which she received the money to take to Damien Connolly (tr.2-82). The money was at John Connolly's apartment when she arrived. A friend of hers, Mary Brunchorst, taped the money on Dawn's

legs and she had on a skirt and then took the money to Jamaica.(tr.2-82) Randy Freidel was also in John Connolly's apartment that day. (tr.2-83) Randy was there to visit Mary Brunchorst (tr. 2-84).

Dawn flew to Jamaica alone. (tr.2-86) When she got to the airport Damien picked her up and they went to a hotel. (tr.2-87) It was late at night probably close to midnight. (tr. 2-87) Dawn does not remember the name of the place where she and Damien stayed that night. (tr.2-87) Dawn says that Bob Curley was in another bedroom in the hotel room asleep. (tr.2-87-88) Dawn gave the money to Damien in the bathroom of the hotel room. (tr. 2-88) Dawn does not recall going anywhere else that night before retiring for the evening. (tr. 2-88)

During the visit Dawn and Damien went to dinner and then dancing with Des, Marc Dorman, Dorman's girlfriend and Bob Curley.(tr.2-87) Other than the dinner she never saw Damien meet with any of the other people involved in the smuggle while she was there. (tr.2-89) She did not see the boat or marijuana while she was there. (tr. 2-89) Dawn was basically vacationing and Damien was with her most of the time. (tr.2-90) Dawn learned that Damien had succeeded in obtaining the load of marijuana for the boat.(tr.2-90) Dorman was going to be the pilot.(tr.2-90) Damien did not tell Dawn what he did with the money.(tr.2-90) It was kind of unsure as to whether the source of marijuana was going to be Des or Bob and Damien did not tell Dawn anything different before Dawn left Jamaica. (tr.2-90) Damien said

he could leave now because everything was set to go. (tr.2-90)

Dawn Rexroat Connolly's passport (government exhibit 21 in evidence) is stamped with entry into Jamaica on July 7, 1988 and exit from Jamaica and entry at O'Hare, Chicago on July 11, 1988.(tr.2-101)

Robert Curley's passport Defendant's exhibit 102 in evidence shows entry to and exit from Jamaica in June 1988 and no stamps for July 1988.

In 1988 Damien Connolly got David Van Arsdale to drive to North Carolina to pick up the marijuana from Jamaica. (tr. 1-182) This was not the first time that David Van Arsdale transported marijuana for Damien Connolly. In 1983 Damien Connolly offered David Van Arsdale Seven or Eight Thousand dollars to transport a large quantity of

marijuana. (tr. 1-157) On that occasion he drove a rented U-haul from Madison to Beaufort, North Carolina had it filled with marijuana and drove it back to Madison, Wisconsin. (tr. 1-158) Another driver and the skipper of the boat were also involved.(tr.1-159) The skipper was Diver (1-159). The other driver was Russell Habeck.(tr.1-159) Jeb the harbor master was also involved.(tr.1-162)

In 1986 or 1987 Damien asked David Van Arsdale to drive an RV to North Carolina and back (tr. 1-165-166) In North Carolina after the ship arrived Damien Connolly and others put hundreds of small bricks of marijuana in the RV.(tr. 1-169-170) After they got to Madison they took the marijuana to Randy Freidel's house (tr.172). The RV was registered in Van Arsdale's name (tr. 1-

172-173).

Sometime in June of 1988 Damien Connolly contacted David Van Arsdale about the possibility of assisting him in his marijuana smuggling. (tr. 1-181) Damien Connolly, Tom Morgan and David Van Arsdale drove the RV form Madison Wisconsin to Beaufort, North Carolina (tr.1-186) When they got to Beaufort the marijuana was already in the area. (tr. 1-189) Damien told David Van Arsdale that the skipper of the boat was Marc Dorman and that the harbor master was Jeb. (tr.1-192) Damien said to Van Arsdale that the marijuana was going to be from Jamaica. (tr.1-192) Damien Connolly said that Bob Curley was going to be possibly arranging for this Jamaican marijuana.(tr. 1-192) Damien Connolly told Van Arsdale that Mr. Curley's role was possibly or it was an

arranger between the local Jamaican people and having it--make sure it was on the boat.(tr.1-194)

After the RV was loaded Damien Connolly flew to Madison. Damien and Dawn Connolly were staying at Tom Morgan's residence while Tom was driving back from North Carolina. (tr.2-103) Tom Curley and another man came to the residence. (tr.2-105) He was visibly angry. (tr. 2-105) Either he or the man slammed a black case on the counter and opened it and it contained a gun.(tr.2-105) Damien said the gun was an Uzi.(tr.2-151) Damien rushed Dawn into a different section of the house and told her to stay there. (tr. 2-105) The person with Robert Curley was a black male in his thirties with long hair and Damien thought his name was Wrench. (tr.2-105) Dawn could not hear

specifically what Curley, Wrench and Connolly were saying. (tr.2-106) They were pretty much yelling--they were angry. It wasn't like friendly tones.(tr-2-106) Bob Curley was demanding. (tr. 2-106) The angry exchange of voices lasted for ten or fifteen minutes. (tr.2-107) It related to the marijuana smuggle.(tr. 2-107) Damien told Dawn that Curley pulled a gun on Damien and demanded money from him immediately. (tr. 2-107) After Wrench and Curley left Damien was frantic to try to figure out how he could collect this money by one o'clock the next day.(tr.2-108) The amount of $100,000 was being demanded for payment because the marijuana had then reached U.S. soil and so Bob Curley was demanding payment for the Jamaican side.(tr.2-108) The marijuana had not

reached Madison to Dawn's knowledge.(tr.2-108) Damien was going to raise the money. He was going to phone Houden immediately.(tr.2-108) He made a phone call to Chris Houden asking him for the money which he needed by one o'clock that afternoon because he had been threatened. (tr.2-109) Dawn and Damien made arrangements to pick the money up on the west side of town near Chris Houden's house.(tr-109) Dawn can't remember the specific amount.(tr.2-109) They had all the money gathered and they had all the money ready to be delivered by one o'clock. (tr.2-110)

Tom Morgan and David Van Arsdale drove the RV full of marijuana to Madison and parked it at Randy's house. (tr. 1-199) They arrived about August 12th or 13th (tr.1-222). Damien and Dawn Connolly where there when Van Arsdale

arrived at Randy's.(tr. 1-199) There was an immediate concern of getting money, of getting money seemed to be on Damien's mind.(tr.1-201) Damien told Van Arsdale that his concern for money was that Robert Curley was being persistent into having some money for payment of the marijuana.(tr.1-201) Damien was stressed.(tr.1-201) Van Arsdale went to several locations with Dawn and Damien. (tr. 1-202) He was making phone calls trying to collect money.(tr.1-202) They went to 2 locations the White House and a restaurant by the--Nautical.(tr.1-203) They traveled around making phone calls trying to raise money 2 two and a half, three hours.(tr.1-203) He was very worried about the Rastafarian.(tr.1-203) Around 11:30 Van Arsdale, Dawn and Damien drove to John Connolly's apartment on Wilson Street. (tr.1-204)

John Connolly and Randy were there.(tr.1-204) During the 30 to 45 minutes that Van Arsdale was present there were several highly stressed discussions about the money or the Rastafarians. (tr.1-205-206) Van Arsdale went to the Echo Tavern about four blocks away.(tr.1-206)

Dawn recalls that Damien and she went to the west side of town near Chris Houden's house to pick up the money.(tr.2-109) The money was packaged in a brown paper bag. (tr.2-109) Damien delivered the money to Wrench and Curley.(tr.-110) Dawn did not see him deliver the money. She just dropped him off and that's the last she saw.(tr.2-110)

In the week that followed the payment of the money Dawn did not see Bob Curley again.(tr.2-118) Damien told

Dawn that Bob Curley told Damien that it was all show to impress the Jamaicans.(tr.2-119)

Damien told Dawn that he stood to gain $100,000 through the smuggle. (tr.2-120) She could not recall exactly but he did not get $100,000 himself.(tr.2-120) Dawn seemed to recall that Damien said that Curley got $100,000. (tr.2-120-121)

Van Arsdale claims that Dawn gave him a brown paper bag(tr.1-207) Dawn dropped him off at the side entrance to John Connolly's apartment. (tr.1-208) Van Arsdale just walked in and Bob Curley was there and no one else was there. (tr.1-208) Van Arsdale handed him the bag and said here you go.(tr.1-209) Curley dumped the money on the floor and started counting it (tr.1-211) Van Arsdale went to the refrigerator to get

a beer.(tr.1-211) Van Arsdale saw approximately 15, 20, 30 bundles. (tr.1-212) Curley counted out a certain amount of money and said it was for himself.(tr.1-212) He put the money in an open gym bag. (tr.1-212) Van Arsdale saw a hand gun in the gym bag.(tr.1-213) The brown bag and the money wound up in the gym bag. (tr.1-213) Van Arsdale left met Dawn outside and they drove back to the Echo Tavern.(tr. 1-214)

No evidence was offered that Robert Curley had anything to do with the marijuana after it left Jamaica or after it landed in North Carolina.

Petitioner argued in a Motion for New Trial that his stake in the venture instructions should have been given. The motion was denied. The appeal and this petition followed.

REASONS FOR GRANTING THE WRIT

I.

In United States v. Falcone 109 F 2d 579, 581 (2d Cir. 1940) the Second Circuit held that an alleged conspirator "...must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders." 109 F 2d at 581 see also United States v. Zeuli 137 F 2d 845, 847 (2nd Cir. 1943) and United States v. Peoni 100 F 2d 401 (2nd Cir.1938).

In the present case the 7th Circuit squarely rejected a requirement that the government prove that a conspirator have a stake in the venture. The court

held:"Curley next complains that he was entitled to receive an instruction informing the jury that it may not convict him unless it found that he had a `stake in the venture'. That is, Curley could not be found guilty unless his compensation depended on Connolly's successful retail distribution of the marijuana. ... The law does not require the government to prove that a defendant had a stake in a drug distribution venture to gain a conviction for conspiracy. Direct Sales co. v. United States 319 U.S. 703, 713 (1943). That a defendant had a stake in the success of the venture is simply one method among many of proving participation in the conspiracy. Id.

The cases are replete with circumstances in which defendants have been convicted of conspiracy by

performing tasks unrelated to selling drugs on the street. An obvious example is the mule who transports the drugs from one part of the country to another. See, e.g. [United States] v.Donovan, 24 F 3d [908] at 914 [(7th Cir. 1994)]. Curley's case is another example." (slip opinion at pages 5-6)

Curley was entitled to a stake in the venture instruction because he did not agree to help Connolly distribute marijuana. Here Robert Curley had nothing to do with the marijuana after it was on the boat. Curley's compensation was not contingent on the sale of the marijuana after it arrived in the United States. Curley did not agree with Damien Connolly to help him distribute marijuana in Madison Wisconsin. Curley demanded payment before the marijuana arrived in Madison.

From the time that the marijuana was on the boat in Jamaica Curley and Damien Connolly were adverse and not working together. Curley had no stake in the venture. The theory of the defense case was that Curley may have facilitated the transfer of marijuana form the Jamaicans to Connolly for a fee to come out of the Jamaican's side of the purchase price, but he did not agree with Connolly to distribute marijuana. To test the essence of the charged conspiracy Curley was entitled to a stake in the venture instruction.

This court should grant certiorari to resolve the conflict between judge Learned Hand's view of the essence of conspiracy (2nd Circuit) and judge William Bauer's view (7th Circuit).

CONCLUSION

For the foregoing reasons petitioner asks the court to grant certiorari to the United States Court of Appeals for the 7th Circuit to review the petitioner's conviction.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

No. 94-2379

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT W. CURLEY,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 93 CR 86—John C. Shabaz, *Judge.*

ARGUED FEBRUARY 24, 1995—DECIDED MAY 12, 1995

Before POSNER, *Chief Judge,* and BAUER and ROVNER, *Circuit Judges.*

BAUER, *Circuit Judge.* A jury convicted Robert Curley of conspiring to possess marijuana with intent to distribute it, in violation of 21 U.S.C. §§ 841(a)(1), 846. For this offense, the district court sentenced Curley to ninety-two months in the penitentiary and fined him $12,500. On appeal, Curley makes a number of challenges with respect to his conviction and sentence. Finding none of the challenges meritorious, we affirm.

During the summer of 1988, Damien Connolly, an acquaintance of Curley's, sought to smuggle marijuana from Jamaica to the United States with the intention of selling it in southern Wisconsin. Connolly enlisted Curley's

assistance to accomplish his objective; Curley had apparently supplied Connolly with marijuana previously. Curley then arranged for contacts in Jamaica to supply the quantity of marijuana Connolly sought.

In July 1988, Connolly, Curley, and others met in Jamaica and arranged to smuggle the marijuana to the United States. During the course of making these arrangements, Connolly called his girlfriend (now his estranged wife), Dawn Rexroate, and ordered her to fly to Jamaica with the $40,000 necessary for a down payment on the marijuana; Rexroate did so. While in Jamaica, Rexroate stayed with Connolly, who shared a two-bedroom suite with Curley. Rexroate and Connolly socialized with Curley and other members of the conspiracy during their stay in Jamaica. Connolly also told Rexroate that Curley was responsible for procuring the marijuana.

Curley arranged for his contacts to deliver the marijuana to a boat, which then sailed to the United States. It is not clear whether Curley also arranged for the boat and its crew or simply established the source of the marijuana and had it put aboard the boat. The boat was sailed to Beaufort, North Carolina, where Connolly and a friend, Mark Dorman, transferred the marijuana to a recreational vehicle belonging to Connolly. From there, two men who had previously participated in Connolly's drug operations, Tom Morgan and David Van Arsdale, drove the vehicle to Madison, Wisconsin, on August 11, 1988.

On that day, Curley, with an Uzi sub-machine gun and a black Jamaican man (nick)named Wrench, went to Tom Morgan's house to demand payment from Connolly. Curley gave Connolly until 1:00 PM the next day to satisfy the debt. Connolly gathered the funds necessary to satisfy his debt and on August 12, 1988, ordered Rexroate to drive Van Arsdale to Connolly's brother's apartment to deliver the payment to Curley. While there, Van Arsdale saw Curley count the money. Curley then separated out several bundles of bills and said: "This is for me." Curley put his share in a duffel bag, which also contained a pistol.

Later that month, Curley visited Connolly and Rexroate at their home and discussed the transaction. Curley explained his hostile and threatening demand for payment as "a show for the Jamaicans." At this meeting, Connolly boasted to Rexroate that he and Curley had realized $100,000 as a result of their marijuana transaction.

Curley challenges his conviction on several grounds, but the central theme of his argument is that he had nothing to do with selling the marijuana on the street. According to Curley, since nothing linked him to the actual retail distribution of the marijuana, he cannot be convicted of conspiracy to distribute the marijuana. Curley's argument misses the boat.

First, Curley argues that the government presented insufficient evidence to support his conspiracy conviction. Curley has an onerous burden here; he must demonstrate that viewing the evidence against him in the light most favorable to the government, no reasonable jury could have found him guilty of conspiracy to distribute marijuana. To convict Curley of conspiracy, the government was required to prove the existence of an agreement between Curley and Connolly to violate the Controlled Substances Act, *see United States v. Sanders*, 32 F.3d 299, 302 (7th Cir. 1994); the government did not have to prove that Curley participated in every phase of the conspiracy, it merely needed to prove that he committed some overt act furthering the conspiracy. *See United States v. Donovan*, 24 F.3d 908, 914 (7th Cir. 1994). The government easily met its burden, and the jury acted reasonably in returning a guilty verdict.

Curley argues that the government failed to prove his membership in the conspiracy because it did not prove that he agreed to distribute the marijuana. He claims he had very limited involvement in this operation and maintains that he merely brokered the sale of marijuana by Jamaicans to Connolly. Curley bases his argument entirely on our decision in *United States v. Lechuga*, 994 F.2d 346 (7th Cir. 1993) (en banc), in which we held that the sale

of "large quantities of controlled substances, without more, cannot sustain a conspiracy conviction." While this proposition retains its vitality, it is of little use to Curley. His case certainly concerns the sale of a large quantity of a controlled substance—literally a boatload of marijuana. Unfortunately for Curley, his case involves more than just a large transfer of drugs.

The evidence against Curley (principally the testimony of Rexroate and Van Arsdale) contradicts his claim that he did not join Connolly's band. The government's evidence demonstrated the following: Curley knew Connolly as early as 1987, if not earlier; they were apparent friends. Connolly needed a source of marijuana and recruited Curley to perform that critical function. Connolly knew that Curley had contacts in Jamaica through which he could procure the necessary quantity of marijuana.

Further, this was not some arms-length transaction, a simple anonymous buy-sell, as Curley would have us believe. Curley and Connolly shared a two-room suite in Jamaica while Curley made arrangements to obtain the marijuana. They also socialized daily with one another, as well as others involved in the conspiracy, during this trip. This socializing permitted the inference that the deal was being hatched right then. Finally, after ensuring the delivery of the marijuana and putting on the tough-guy performance to demand payment for the marijuana, Curley returned the following week to smooth his relationship with Connolly. Evidence of their relationship throughout the period of the conspiracy was manifest. Clearly, the jury had a rational basis for believing that Curley had agreed to participate in Connolly's conspiracy to distribute marijuana.

Curley is correct in stating that the government presented no evidence that Curley had anything to do with the retail distribution of the marijuana. To reiterate, however, he need not have participated in every aspect of the conspiracy, just committed some overt act furthering it. Curley's role in Connolly's organization, arranging for

the source of the marijuana, was a necessary part of this conspiracy and certainly constituted an overt act in its furtherance. The government's evidence, therefore, was easily sufficient to support Curley's conviction for conspiracy to distribute marijuana.

Curley next complains that he was entitled to receive an instruction informing the jury that it may not convict him unless it found that he had a "stake in the venture." That is, Curley could not be found guilty unless his compensation depended on Connolly's successful retail distribution of the marijuana.[1] As this argument simply rehashes Curley's argument that he had no part in selling the marijuana on the street, we reject it.

A defendant is entitled to an instruction on his theory of the case if he proposes a correct statement of the law, his theory is supported by the evidence, his theory of defense is not part of the charge, and the failure to include an instruction on his theory of defense in the jury charge would deny him a fair trial. *United States v. Boykins*, 9 F.3d 1278, 1285 (7th Cir. 1993) (citations omitted). Curley's proposed instructions are not correct statements of law. The law does not require the government to prove that a defendant had a stake in a drug distribution venture to gain a conviction for conspiracy. *Direct Sales Co. v. United States*, 319 U.S. 703, 713 (1943). That a defendant

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[1] Specifically, Curley requested the following instructions:

> A person who has no stake in a venture which has as its object the possession and distribution of drugs is not a conspirator of those who agreed to possess and distribute drugs. In order for the government to prove that a defendant was a conspirator with others who agreed to possess and distribute drugs, it is necessary for the government to prove beyond a reasonable doubt that such person's fortunes would rise or fall with the success or failure of that conspiracy.
>
> A person is not a member of a conspiracy unless he has a stake in the venture. That is, unless he will profit by the achievement of the conspiracy. A person who merely aids and abets conspirators is not a member of the conspiracy.

had a stake in the success of the venture is simply one method among many of proving his participation in the conspiracy. *Id.*

The cases are replete with circumstances in which defendants have been convicted of conspiracy by performing tasks unrelated to selling drugs on the street. An obvious example is the mule who transports the drugs from one part of the country to another. *See, e.g., Donovan*, 24 F.3d at 914. Curley's case is another example. The key point is one that we have discussed: that the government need only prove that the defendant joined an agreement to distribute drugs. That was the substance of the conspiracy instructions in Curley's trial, and we therefore reject Curley's challenge to them.

Curley's third argument is that his prosecution was barred by the five-year statute of limitations, pursuant to 18 U.S.C. § 3282. He is mistaken. The statute of limitations runs from the last overt act in furtherance of that conspiracy. *United States v. Read*, 658 F.2d 1225, 1232 (7th Cir. 1981). To comply with the statute, the government must prove that the conspiracy existed and the defendant was a member of the conspiracy at some point in the five years preceding the date of the indictment. *Grunewald v. United States*, 353 U.S. 391, 396 (1957).

The indictment was returned on August 4, 1993. Curley received the payment for his role in the conspiracy on August 12, 1988. In addition, because Curley has not argued that he withdrew, in a legal sense, from the conspiracy at any point, acts in furtherance of Connolly's operation can be attributed to Curley even after the date of his payment. The statute of limitations, therefore, did not bar Curley's prosecution.

Similarly, Curley claims that his prosecution was improperly brought in the Western District of Wisconsin. Rule 18 of the Federal Rules of Criminal Procedure provides that "the prosecution shall be had in a district in which the offense was committed." Any district is proper where an act in furtherance of the conspiracy occurred.

United States v. Sax, 39 F.3d 1380, 1390 (7th Cir. 1994). There is no question here that many acts furthering the conspiracy occurred in the Western District of Wisconsin, not the least of which was Connolly's payment to Curley.

Curley also complains of certain statements made by the government in its closing argument. Only one is worthy of any attention. The government explained the absence of any stamps of entry to or exit from Jamaica on Curley's passport by implying that he travelled there under an assumed name with a phony passport. Because no objection was made to the comment, we review it for plain error. *United States v. Rose*, 12 F.3d 1414, 1424 (7th Cir. 1994).

"There is no plain error where the prosecutor's argument is reasonably inferred from the evidence and the defense had a reasonable opportunity to respond." *Id.* (citation omitted). This is precisely the situation here as the prosecutor's comment constitutes an acceptable comment on the evidence. Rexroate gave extensive testimony of Curley's presence in Jamaica in July 1988. The prosecutor was simply attempting to reconcile her detailed testimony with the absence of any stamps on Curley's passport. Moreover, the defense had ample opportunity to present its own view of this fact. Consequently, we find no error.

Finally, Curley challenges two aspects of his sentence. First, he claims that the district judge erred when it did not permit him a two-level decrease for acceptance of responsibility. Curley acknowledged his crime only after he was convicted. Acceptance of responsibility means that "the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." United States Sentencing Commission, *Guidelines Manual*, § 3E1.1(a). A defendant may demonstrate this by performing any number of expiatory acts. *United States v. Beserra*, 967 F.2d 254, 255 (7th Cir. 1992) (citing USSG § 3E1.1, comment. (n.1)). Except in rare circum-

stances, a plea of guilty is a necessary, if not a sufficient, condition for acceptance of responsibility. *United States v. Martinson*, 37 F.3d 353, 357 (7th Cir. 1994). This is not such an instance and we find no error. *See* USSG § 3E1.1, comment. (n.2).

Second, Curley claims that the district judge erred in assessing him a two-level enhancement for possession of a firearm. We review such a claim for clear error. *United States v. Cantero*, 995 F.2d 1407, 1409 (7th Cir. 1993). Here we find no error of any kind.

Section 2D1.1(b)(1) provides for a two-level enhancement "[i]f a dangerous weapon (including a firearm) was possessed." Application note 3 to that section states that the "adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." Clearly, the testimony of Rexroate that Curley brandished a gun when he demanded payment and the testimony of Van Arsdale that Curley had a gun in his bag when Van Arsdale delivered the money support the district judge's finding that Curley possessed a firearm. Curley's sentence was appropriate in every respect.

For the foregoing reasons, Curley's conviction for conspiracy to distribute marijuana and sentence are

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES COURT OF APPEALS

For the Seventh Circuit

JUDGMENT - WITH ORAL ARGUMENT

Date: May 12, 1995

Before: Hon. Richard Posner, Chief Judge

Hon. William Bauer, Circuit Judge

Hon. Ilanna Rovener, Circuit Judge

No. 94-2379

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

ROBERT W. CURLEY,

Defendant-Appellant

Appeal from the United States District Court for the Western District of Wisconsin, No. 93 CR 86--John C. Shabaz, Judge

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, It is

ORDERED and ADJUDGED by this court that the judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered this date.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WISCONSIN

JUN 7 1994

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

V. (For Offenses Committed On or After November 1, 1987)

ROBERT W. CURLEY Case Number 93-CR-86-S

(Name of Defendant)

James M. Shellow

Defendant's Attorney

The Defendant

X was found guilty on count I of the indictment after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count, which involve the following offenses:

Title & Section

21 U.S.C. Sections 846 and 841(a)(1)

Nature of the Offense

Conspiracy to Possess with Intent to Distribute Marijuana

Count Number

I

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing REform Act of 1984.

X The defendant has been found not guilty on count II of the Indictment and is discharged as to such count(s).

X It is ordered that the defendant shall pay a special assessment of $50.00 for count I of the Indictment, which shall be due X immediately To the U.S. Clerk of Court, Western District of Wisconsin

It is further Ordered that the defendant shall notify the United States Attorney for the district within 30 days of any change of name, residence, or mailing

address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sce. No.:345-48-7795

Defendant's Date of Birth: 7/3/52

Defendant's Mailing Address:

Dane County Jail

210 Martin Luther King, Jr. Blvd.

Madison, Wisconsin 53709

Defendant's Residence Address:

Rural Route 2, Box 156

Dodgeville, Wisconsin 53533

June 1, 1994

Date of Imposition of Sentence

/s/ John C. Shabaz

Signature of Judicial Officer

John C. Shabaz, District Judge

Date June 6, 1994

IMPRISONMENT

The defendant is hereby committed to the custody of the United States

Bureau of Prisons to be imprisoned for a term of ninety-two (92) months as to Count I of the indictment, to be followed by a five (5) year term of supervised release. It is further adjudged that the defendant pay a $12,500 fine, payable to the U.S. Clerk of Court, Western District of Wisconsin, which is due in full not later than December 31, 1994, interest to accrue on any portion of the fine not paid by said date.

As special conditions of supervised release the defendant is to 1) provide the U.S. Probation Officer with financial information as requested; 2) register with local law enforcement agencies as directed; 3) allow searches by the supervising U.S. Probation Officer of any residence or property under the defendant's control where

there is reason to believe the defendant is in possession of illegal narcotics, stolen materials, firearms, or other contraband and the defendant shall permit confiscation of the contraband material; 4) abstain from illegal drug use, excessive alcohol use, and from sales and associations with all drug users and dealers, and participate in an alcohol/drug treatment program, including urine surveillance testing as directed by the supervising U.S. Probation Officer; and 5) pay the remaining balance of the fine to the U.S. Clerk of Court, full payment of fine due six months prior to the expiration of the term of supervised release.

It is further adjudged that the defendant pay a $50 criminal assessment penalty as to Count I of the Indictment

to the U.S. Clerk of Court immediately following sentencing.

The Court finds that the defendant has sufficient assets to pay the fine at the lower end of the fine range pursuant to Sec. 5E1.2(c)(3) and (4). The Court further finds that the defendant's earning potential will be significantly limited in the future. Therefore, imposing an additional fine or costs of his confinement or supervision pursuant to Sec. 5E1.2(i) would impair the defendant's ability to support himself and pay the fine ordered.

The Court recommends that the defendant spend the last 90 days of his confinement in a community correctional center with work release privileges, but without home confinement. The Court further recommends that the defendant receive drug treatment during his term

of imprisonment.

The defendant is remanded to the custody of the United States Marshal.

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